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The Impact of the Proposed California Civil Rights Initiative

By ERWIN CHERMERINSKY*

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The proposed California Civil Rights Initiative¹ seeks to eliminate affirmative action by government entities in California except where required by federal law. A vast array of state and local programs intended to remedy discrimination against women and minorities would be eliminated. Moreover, future innovative programs designed to overcome continuing discrimination would never be implemented.

The CCRI would eliminate all state and local programs that “grant preferential treatment to any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.”² This would eliminate outreach programs targeting women and minorities, goals and timetables, and countless other efforts to overcome past race and gender discrimination.

Additionally, the CCRI actually would tolerate more discrimination against women than is permitted under current law. Subdivision (c) of the proposed initiative declares: “Nothing in this section shall

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1. Bill Jones, Secretary of State, Proposition 209, in CALIFORNIA BALLOT PAMPHLET, GENERAL ELECTION, Nov. 5, 1996 (forthcoming Sept. 1996) [hereinafter CCRI].

2. *Id.*

be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education, or public contracting."³ Current law allows bona fide occupational qualifications based on gender in only a limited number of employment circumstances. For example, no current law, state or federal, allows gender to be used as a qualification for public education or public contracting. Yet the CCRI would permit gender-based qualifications in this context, thereby expressly permitting discrimination against women in areas never before allowed.

In fact, the CCRI could mean a major change in California constitutional law that would substantially lessen the protection against gender discrimination. Currently, under the California Constitution, gender is treated as a suspect classification. That is, gender discrimination is allowed only if it is necessary to achieve a compelling government purpose.⁴ The CCRI would amend the California Constitution to allow gender discrimination in employment, education, and public contracting whenever "reasonably necessary" to achieve a bona fide qualification.⁵ This shift to a rational basis standard of review would be a dramatic change in the law and would eviscerate the California constitutional protection against sex-based discrimination.⁶ These effects are discussed in detail below.

This Article focuses solely on assessing the likely impact of the CCRI on women and minorities in the state. Therefore, several important topics are not considered. For example, this Article does not discuss the constitutionality of the CCRI and whether it could withstand challenge in the courts. Nor does this Article assess the economic costs if state and local governments eliminate affirmative action. Perhaps most important, voluntary affirmative action in the private sector is also not considered in this Article. Since the CCRI applies only to the government and government agencies, it would not preclude private employers from engaging in voluntary affirmative action. Thus, possible ramifications of the CCRI in discouraging private affirmative action efforts are beyond the scope of this Article. Finally, it must be emphasized that this is only a preliminary assessment as there remains a continuing need to obtain additional information about state and local affirmative action programs and their effects.

3. *Id.*

4. *See infra* note 17.

5. CCRI, *supra* note 1.

6. *See infra*, notes 66, 73 and accompanying text.

Statistics about the impact of affirmative action programs are difficult to find. The most extensive data involves the impact of affirmative action in the University of California system. Because of the recent decision by the Regents to eliminate affirmative action in the University of California, the CCRI will have minimal immediate impact in that realm.⁷ Accordingly, this Article does not examine the CCRI's impact on the University of California in detail. However, because the CCRI is a constitutional amendment, and therefore very difficult to change, it would be much harder to modify or overturn the Regents' decision to eliminate affirmative action in the future.

Additionally, the effects of the CCRI will be greatly increased if pending federal legislation, which would eliminate affirmative action at the federal level, is adopted.⁸ However, neither of these bills has been reported out of committee. If the federal laws are changed, the CCRI will have a substantially greater impact. Thus, the fundamental question arises as to whether the CCRI is a desirable change in California law without reference to federal law. Examination of the interplay between the CCRI and federal legislation aimed at eliminating affirmative action presents further challenges beyond the scope of this Article. For example, an interesting question arises regarding what to do if the federal law is not changed and there are conflicting standards in programs that require the use of both federal and state funds.

This Article addresses the impact of the CCRI in three parts. Part I briefly describes the context of the affirmative action debate. Two points are essential in discussing affirmative action. First, discrimination against women and minorities remains an extremely serious problem in California as well as the entire country. Second, affirmative action efforts are already limited by Supreme Court decisions. Under these rulings, the government can engage in affirmative action only where it is necessary to achieve a "compelling purpose."⁹ Under the CCRI, affirmative action programs would be eliminated even when they meet this strict standard and serve a vital objective. Only those programs required by federal law would survive the CCRI.

Part II, which is the main part of this Article, describes the impact of the CCRI in eliminating programs that benefit women and minorities. Part II specifically considers the effects of the CCRI in eliminating affirmative action in employment, education, and contracting.

7. See Susan Yoachum et al., *UC Scraps Affirmative Action*, S.F. CHRON., July 21, 1995, at A1.

8. See H.R. 2128, 104th Cong., 1st Sess. (1995); S. 1085, 104th Cong., 1st Sess. (1995).

9. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

Finally, Part III of this Article briefly explains how the CCRI would allow more gender discrimination than is permitted under current law as the CCRI expressly allows gender to be used as a basis for discrimination in contracting, education, and employment. Part III also explains that one of the most important effects of the CCRI could be to lessen dramatically the protection against gender discrimination under the California Constitution.

I. The Context for the Debate Over the CCRI

In order to accurately assess the impact of the CCRI, it is essential to recognize the ongoing problem of discrimination against women and minorities as well as the extent to which government affirmative action is already limited by current law. By any measure, enormous inequities based on race and gender remain in the workforce. Studies consistently show that whites and blacks, with identical educational backgrounds and employment histories, are treated differently in hiring and employment. Whites are more likely to get hired, more likely to receive higher salaries once hired, and less likely to be fired.¹⁰ A controlled study found that white testers received job interviews at a rate 22% higher than equally situated African-American testers; white testers received job offers at a rate 415% higher than African-American testers; white testers received higher wage offers 17% of the time; and white testers were 48% more likely to be informed of additional opportunities than African-American testers.¹¹

These gender and race inequities permeate the employment process. For example, Secretary of Labor Robert Reich found that 97% of the senior managers of the Fortune 1000 industrial companies and the Fortune 500 companies are white, and 95% to 97% are male.¹² Specifically, the racial breakdown is: 97% white, 0.6% African-American, 0.3% Asian, and 0.4% Latino.¹³ In Fortune 2000 industrial and service companies, 5% of senior managers are women, and of that

10. See, e.g., Marc Bendick, Jr., *Research Evidence on Racial/Ethnic Discrimination for Affirmative Action in Employment*, in DISCRIMINATION AND AFFIRMATIVE ACTION A-61, A-65 (Assembly Judiciary Comm., Cal. State Legis. 1995).

11. *Id.* See also Mark Bendick, Jr. et al., *Measuring Employment Discrimination Through Controlled Experiments*, 23 REV. BLACK POL. ECON. 25 (1994); for reports of other similar studies, see also GEORGE STEPHANOPOULOS & CHRISTOPHER EDLEY, JR., AFFIRMATIVE ACTION REVIEW: REPORT TO THE PRESIDENT 21 (July 19, 1995).

12. ASSEMBLY JUDICIARY COMM., CAL. STATE LEGIS., DISCRIMINATION AND AFFIRMATIVE ACTION A-21 (1995) (testimony of Maria Contreas-Sweet and Beverly A. King).

13. *Id.*

5%, virtually all are white.¹⁴ The disparities present in wage distribution also reflect gender and race inequities. African-American men with professional degrees earn only 79% of the amount their white male counterparts earn; African-American women with professional degrees earn only 60% of what white males earn with similar credentials.¹⁵ A recent study by Andrew Brimmer, former Assistant Secretary of Commerce, found that the annual loss to the United States' economy from discrimination against African-Americans alone is approximately \$240 billion.¹⁶

Countless studies have been conducted which show that discrimination against women and minorities continues. Further, a large body of data has accumulated revealing the impact of such discrimination. Thus, any discussion of affirmative action must begin by recognizing that discrimination and its effects continue to be a serious problem.

Additionally, it also must be recognized that under current law the ability of the government to engage in affirmative action programs is limited. The Supreme Court has made it clear that the government may use race as a factor to help minorities only if the program meets strict scrutiny and is "narrowly tailored." That is, the government must prove that the affirmative action plan is necessary to achieve a compelling government purpose.¹⁷ Expressed another way, the test for racial classifications under the federal Constitution is the same, whether the discrimination is against minorities or against whites, as strict scrutiny must be met if the government is using race as a basis for decision-making.

Examples of the Supreme Court's implementation of strict scrutiny are evidenced in two recent cases. In 1989, in *City of Richmond v. J.A. Croson Co.*,¹⁸ the Court invalidated a city's plan to set aside public works monies for minority-owned businesses, and held generally that all state and local use of racial classifications to benefit minorities must meet strict scrutiny.¹⁹ In 1995, in *Adarand Constructors, Inc. v. Peña*,²⁰ the Court extended the *Croson* holding to include the federal

14. *Id.*

15. *Id.*

16. Larry Bivins, *Discrimination Said to Cost More than Affirmative Action*, THE DETROIT NEWS, April 18, 1995, available in LEXIS Nexis Library.

17. Gender discrimination is subject to intermediate scrutiny and thus it must be substantially related to an important government purpose. See, e.g., *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *Craig v. Boren*, 429 U.S. 190 (1976).

18. 488 U.S. 469 (1989).

19. *Id.* at 509-11.

20. 115 S. Ct. 2097 (1995).

government and held that all racial classifications, regardless of the level of government imposing them, must meet strict scrutiny.²¹

California therefore is already substantially limited in its ability to engage in any conduct, including affirmative action, that discriminates based on race or gender. Race discrimination, for example, is allowed only if the state or local government can prove that it is necessary to achieve a compelling interest and that it is narrowly tailored to achieve that interest. Implementation of the CCRI would eliminate even the affirmative action efforts that meet this extremely rigorous test.

II. The Impact of Eliminating Preferences

Under the CCRI, even if a government action does not discriminate, if it in any way advantages or helps based on race or gender, it will be unlawful. According to subdivision (a) of the CCRI: "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."²² It is extremely important to note that the provision distinguished "discrimination" from "preferential treatment." In other words, even a non-discriminatory government action would be outlawed by the CCRI if it advantages or helps based on race or gender. The CCRI, however, does not define "discriminate" or "preferential treatment."

Thus, there is no way to know exactly how courts will construe these phrases. It is likely, however, that government officials and agencies will define these terms broadly so as to avoid the prospect of litigation. In other words, if the CCRI is adopted, there is every reason to believe that state and local officials and agencies will refrain from any actions that might be regarded as discrimination or preferences so as to avoid being sued. At the very least, the CCRI clearly would forbid any difference in treatment of people on the basis of race or gender.²³ Likewise, the CCRI would prevent any programs that attempt to help minorities or women where similar programs do not exist for whites and men.

A vast array of state and local affirmative action programs would also be eliminated. However, before reviewing specific programs, it is

21. *Id.* at 2097.

22. CCRI, *supra* note 1.

23. The only exception is where gender would be a bona fide qualification under subdivision (c), CCRI, *supra* note 1; see also *infra* part III.

important to note that "preferences" can take many forms. For example, preferences exist in the form of outreach programs to encourage women and minorities to apply for jobs, contracts, or educational opportunities. Even if the ultimate decision-making process is color-blind, it is still a "preference" under the CCRI because more effort is made to encourage women and minorities to apply than men or whites.

Preferences also take the form of aggressive recruiting and promotion of higher education of women and minorities. Again, even if the decision-making will be race and gender neutral, affirmative action can be an active step toward finding qualified women and minorities and encouraging them to apply for particular positions. Further, preferences exist in programs that target specific needs among women and minorities. For example, programs which encourage women to pursue advanced education in math and science would be eliminated by the CCRI as a gender-based preference. Similarly, many programs that exist to prepare minorities for higher education likewise would be eliminated.

Another form of preferences are goals for hiring, contracting, and admitting women and minorities to colleges and universities. The Supreme Court has recognized the importance of these types of goals. In *Wygant v. Jackson Board of Education*,²⁴ Justice O'Connor stated that "[a]lthough the constitutionality of the hiring goal as such is not before us, it is impossible to evaluate the necessity of the layoff provision as a remedy for the apparent prior employment discrimination absent reference to that goal."²⁵ Goals and timetables have been key aspects of affirmative action efforts utilized by the Federal Equal Employment Opportunity Commission and by state law.²⁶ The CCRI would eliminate such goals, except where required by federal law, because they set targets for hiring women and minorities and thus are a form of preference, even if no discrimination exists.

Additionally, preferences also occur when race or gender is used as one factor among many in hiring decisions. For example, as a law school faculty member, I have seen our Appointments Committee pursue many objectives simultaneously such as the following: encouraging faculty to teach particular subjects, recruiting individuals with prestigious academic credentials, and seeking racial and gender diversity. There are many factors considered and race undoubtedly is one

24. 476 U.S. 267 (1986).

25. *Id.* at 294 (O'Connor, J., concurring).

26. *See infra* part II.A.

of them. Similarly, under civil service hiring practices, race or gender may be used in selecting among qualified applicants.²⁷ All of this would be eliminated by the CCRI.

Finally, at the extreme, preferences can take the form of set-asides or even quotas. This form of affirmative action is very limited by current law and almost always occurs only if it is ordered by a court as necessary to remedy proven past discrimination.²⁸

Therefore, assessing the impact of the CCRI requires recognizing that it will not simply eliminate set-asides and quotas, which are already quite rare, but a vast array of programs that attempt to remedy a long history of race and gender discrimination. The following sections consider specific programs concerning public employment, public education, and public contracting that would be eliminated by the CCRI.

A. Public Employment

California has a long history of using affirmative action in hiring for state and local government positions. On February 1, 1974, then-Governor Ronald Reagan formalized California's affirmative action program.²⁹ Responsibility for evaluating affirmative action programs was delegated to the State Personnel Board.³⁰ The applicable code, California Government Code section 19790, states: "Each agency and department is responsible for establishing an effective affirmative action program. Each agency and department shall establish goals and timetables designed to overcome any identified under-utilization of minorities and women in their respective organizations."³¹ However, these goals and timetables do not create quotas or set-asides. For example, for state civil service jobs, all applicants must score in the top three rankings on state civil service exams. No extra points are given for race or gender (although extra points are given to veterans). Regardless, gender, race, and ethnicity may be considered by employers in selecting individuals from the lists of those who have satisfactory test scores.³²

The goals and timetables for hiring for state jobs have been successful in many areas. There is no doubt that affirmative action pro-

27. See *infra* part II.A.

28. See *supra* note 18 and accompanying text.

29. CAL. SENATE OFFICE OF RESEARCH, THE STATUS OF AFFIRMATIVE ACTION IN CALIFORNIA 25 (1995).

30. *Id.*

31. Cal. Gov't Code § 19790 (West 1995).

32. *Id.* at 26.

grams have accounted for an increase in the employment of women and minorities, especially in more senior positions. A recent study found that:

[T]he composition of the public work force at the higher salary levels went from being more than 90 percent white in 1975 to less than 70 percent in 1993. The percentage of Asian-Americans, African-Americans, and Hispanics at those levels went from 3 percent or less per group in 1975—the year after Governor Reagan made California's affirmative action program official—to 9.9 percent, 9.3 percent, and 11.7 percent respectively.³³

Since 1978, when the State Personnel Board first reported the results of the state's affirmative action plans, "representation of ethnic minorities increased from 22.7 percent to 41.8 percent[,] a gain of more than 19 percent of all full time employees."³⁴ Women in state government increased from 41.8% to 46.5 % over this time period.³⁵ Thus, goals and timetables have created an incentive for hiring and promoting qualified women and minorities in California. Yet, there are many areas where the goals and timetables have not been met. A study by the California State Personnel Board examined nineteen categories of state jobs. As of June 30, 1992, it found that parity—representation proportionate to representation in the labor market—had been achieved by women in eight of nineteen categories; by African-Americans in sixteen of nineteen categories; by Hispanics in seven of nineteen categories; and by Asians in eleven of nineteen categories.³⁶

The CCRI would eliminate goals and timetables for hiring women and minorities. It is a "preference" to have a goal for hiring women, but not men, or to have a goal for hiring minorities, but not whites. It is a "preference" to encourage employers to select qualified women and minorities when they are among the applicants. Accordingly, under the CCRI, additional progress towards employment parity would be impeded, and some of the gains would be lost. Studies on behavior by employers, discussed earlier,³⁷ indicate that without the encouragement provided by goals, fewer minorities and women will be hired and promoted. Many studies around the country document that goals and targets are very successful in increasing employ-

33. *Id.* at 35.

34. ASSEMBLY JUDICIARY COMM., CAL. STATE LEGIS., *supra* note 12, at A-119 (testimony of Laura M. Aguilera).

35. *Id.*

36. CAL. SENATE OFFICE OF RESEARCH, *supra* note 29, at 26.

37. *See supra* notes 10-16 and accompanying text.

ment of women and minorities.³⁸ Professor Barbara Bergmann, Distinguished Professor in the Department of Economics at American University, attempted to assess the impact of the CCRI on state employment. Her conclusion is sobering:

The loss of affirmative action programs for state and local government employees would result in a deterioration in the labor market position of the African-American and Hispanic communities, and on the labor market position of women generally. The labor market still harbors considerable discrimination against these groups. In part because of the affirmative action programs of public employers, and because of the relative inhospitability [sic] of private employers toward them, members of these groups depend for their earned income disproportionately on public employers. . . . *The loss of affirmative action programs in the public sector could be expected to increase the unemployment rate of African-Americans by more than one percentage point. Unemployment rates for Hispanics and women of all races would also rise.*³⁹

Additionally, outreach programs in local governments exist to increase employment of minorities and women. For example, the Public Works Department, the Fire Department, and the County Sheriff in Los Angeles target female recruits by posting job openings in places frequented by women, such as all-female health clubs. The Public Works Department notifies as many as 800 community agencies of employment opportunities, including the following: 109 that serve the Hispanic community, 56 that represent the African-American community, 50 that serve the American-Indian community, and 30 that represent the interests of Asians and Filipinos.⁴⁰ As part of this outreach effort, the Los Angeles County Public Works Department has implemented a special internship program for minority and female civil engineering students which sponsors tours for minority engineering students allowing them to spend a day at work with a county engineer.⁴¹ The CCRI would abolish these programs because they are recruitment efforts directed at women and minorities; they are a form of "preference" and thus would be eliminated if the CCRI becomes law.

38. See, e.g., Jonathan Leonard, *The Impact of Affirmative Action on Employment*, 2 J. of Labor Econ. 439 (1984); Jonathan Leonard, *The Impact of Affirmative Action Regulation and Equal Employment Law on Black Employment*, 4 J. of Econ. Persp. 47 (1990).

39. Barbara Bergmann, *The Costs of Abolishing Affirmative Action to the State and Local Governments of California*, 3 (1996) (unpublished manuscript, on file with the author) (emphasis added).

40. See OFFICE OF AFFIRMATIVE ACTION COMPLIANCE, SEMI-ANNUAL REPORT TO THE BOARD OF SUPERVISORS OF 1995, Attachment *Affirmative Action Program Good Faith Efforts* (1995).

41. *Id.*

Finally, with regard to employment, it should be noted that the CCRI will have a profound effect on employment discrimination litigation. The CCRI creates a vehicle for any white male denied employment to file a lawsuit and allege that an impermissible "preference" was given to a woman or minority hired in his place. As mentioned above, "preference" is not defined in the statute and its ambiguity is an incentive to sue. Unlike other employment discrimination laws that have administrative remedies and detailed procedures,⁴² the CCRI is an open invitation for disgruntled individuals to file suit and allege impermissible preference. Consequently, assessing what additional costs government will have to bear due to these suits, as well as how much fear over litigation could result in a decrease in the hiring of women and minorities, is an arduous task.

B. Public Education

Affirmative action has made an enormous difference in public education in California. A study of the potential effect of eliminating affirmative action at the University of California found that the percentage of Latino students would drop from 18% to 5-7%, and the percentage of African-American students would fall from 7% to 2%.⁴³ Although the Regents of the University of California already have eliminated affirmative action, the CCRI would have a devastating effect on other programs that exist on state and local levels throughout California. The most important are the many outreach programs designed to benefit women and minorities which would be lost under the CCRI as a form of preference.

For example, many studies have documented the underrepresentation of women in math and science courses at upper-grade levels.⁴⁴ As a result, outreach programs have been created to encourage enrollment. For example, the ACCESS Center and Network of California State University, Los Angeles has created two residential summer math and science intensive programs for middle and high school minority girls in the Long Beach, Los Angeles, and Pasadena school districts. The ACCESS Center, together with California State

42. See, e.g., Americans With Disabilities Act of 1990 § 107, 42 U.S.C. § 12111 (1996); Civil Rights Act of 1964, tit. VII, § 717, 42 U.S.C. § 2000e (1996), as amended by Act of Feb. 15, 1980, 31 U.S.C. § 52, Act of Nov. 21, 1991, 42 U.S.C. § 1981, Act of Jan. 23, 1995, 2 U.S.C. § 1311(d); Age Discrimination in Employment Act of 1967 § 14, 29 U.S.C. § 633 (1996), as amended by Act of Jan. 23, 1995, Pub. L. No. 104-1, § 201(c)(2), 109 Stat. 8.

43. Cynthia Lee, *Scholars Debate Value of Affirmative Action*, U.C. Focus 8, June/July 1995.

44. AM. ASS'N OF UNIV. WOMEN, *HOW SCHOOLS SHORTCHANGE GIRLS*, 26-27 (1992).

University, Los Angeles, has created a "Girls Science Network" for girls in grades six through twelve. The program includes field trips, mentor pairings, and fellowships. Studies of such programs have documented their effectiveness in encouraging girls to enroll in math and science courses and even to pursue these fields in later studies and employment.⁴⁵

Similarly, there are many outreach programs that attempt to recruit and help minority students. The California Postsecondary Education Committee, for example, created an Early Academic Outreach Program for seventh through twelfth graders. The program provided "academic support, individual and group advising, informational materials, summer residential experiences, and assistance with admissions and financial aid applications."⁴⁶ Ninety percent of the students participating were racial minorities. The benefits were dramatic:

In 1994, 46.3 percent of Black program participants and 51.3 percent of Latino program students were eligible to attend the University of California as contrasted with 7.5 percent and 6.8 percent of these same groups statewide who were fully eligible in 1990. . . . Of the graduating seniors who participated in these programs, 72.7 percent enrolled the following fall in California colleges and universities as contrasted to only 61.1 percent of students statewide and 50.6 percent of Black, Latino, and Native American students in the State.⁴⁷

Many other such programs exist. The MESA program—Mathematics, Engineering, and Science Achievement—is primarily funded by the state and seeks to increase the number of minority students with the academic background necessary to pursue a college education in a math or science oriented field of study.⁴⁸ The Immediate Outreach program seeks "[t]o recruit to the University academically qualified underrepresented freshmen and transfer students."⁴⁹ The Systemwide Affirmative Action Support Services program seeks to enhance the academic performance of minority students through academic advising, tutoring, workshops, and summer bridge programs.⁵⁰ The Pregraduate Mentorship Program attempts to provide academic en-

45. CHRISTINE MATTHEWS ROSE, CONGRESSIONAL RESEARCH SERVICE, UNDER-REPRESENTED MINORITIES AND WOMEN IN SCIENCE, MATHEMATICS, AND ENGINEERING: PROBLEMS AND ISSUES FOR THE 1990's (1990).

46. ASSEMBLY JUDICIARY COMM., CAL. STATE LEGIS., *supra* note 12, at A-143 (testimony of Warren H. Fox).

47. *Id.* at A-144.

48. ASSEMBLY JUDICIARY COMM., CAL. STATE LEGIS., *supra* note 12, at F-19.

49. *Id.* at F-103.

50. *Id.*

richment programs and mentoring to help prepare minority students for graduate programs.⁵¹

These are just a few examples of the many programs that are designed for outreach to racial minorities and women who have been traditionally underrepresented in colleges and universities. All such programs would be eliminated as a preference by the CCRI because they are benefits generally not available to white male students. Indeed, a wide array of educational programs that benefit women and minorities at the college and university level would be eliminated by the CCRI. For example, many colleges and universities have "women's resource centers." Typically, these centers provide workshops on various topics such as self-defense, rape prevention, sexual harassment, and other aspects of campus life. These centers provide essential services. One-fourth of college women have been victims of rape or attempted rape⁵² and according to the Association of American College's Project on the Status and Education of Women, approximately thirty percent of all female college students experience some form of sexual harassment.⁵³ Yet, the CCRI would abolish these centers as a preference for women because no comparable programs exist for men.

Additionally, local governments also have outreach programs for women and minorities. For example, the Los Angeles County Public Works Department has a "Partners in Math and Science Program" to mentor minority elementary and secondary students who excel in math and science. The Department also participates in school events to inform female students about jobs which have not traditionally been available to women. The Legislative Analyst's Report to the Attorney General concerning the meaning and fiscal impact of the CCRI concluded that the CCRI would have a devastating effect on such outreach and enrichment programs:

The measure would eliminate affirmative action programs used to promote the hiring and advancement of women and minorities for state and local government jobs, to the extent these programs involve "preferential treatment." In addition, the measure would eliminate a variety of public school (kindergarten through grade 12) and community college programs such as counseling, tutoring, school financial aid, and financial aid to se-

51. *Id.* at F-104.

52. Nadine Brozan, *Gang Rape: A Rising Campus Concern*, N.Y. TIMES, Feb. 17, 1986, at B8; see also *Ten Facts About Violence Against Women: Hearings on S. 101-939 Before the Comm. on the Judiciary on Women and Violence*, 101st Cong., 2d Sess. (1990).

53. Ann Hardie, *Sexual Harassment Widespread on College Campuses in U.S.*, THE ATLANTA CONSTITUTION, Mar. 28, 1991, at A9.

lected school districts, where these programs are targeted based on race, sex, ethnicity, or national origin. . . . The measure would eliminate a variety of programs such as outreach, counseling, tutoring, and financial aid used by the University of California and California State University to admit and assist students from "underrepresented" groups.⁵⁴

C. Public Contracting

The Public Contract Code sets a goal for contracts awarded by any state agency, department, officer, or other state government entity.⁵⁵ The target is as follows: fifteen percent of the contracts should be given to minority business enterprises, and not less than five percent should be given to business enterprises owned by women. The targets are obviously modest; they are goals, not quotas or set-asides. Other statutes set the same goals for public contracts awarded for state correctional facilities and programs.⁵⁶

Discrimination in contracting has long been a serious problem. For example, the Supreme Court expressly recognized a long history of discrimination in public contracting in *Fullilove v. Klutznick*.⁵⁷ In that case, the Court upheld a federal law that set-aside ten percent of federal public works monies to local governments for minority-owned businesses.⁵⁸ Another example is in Los Angeles County, where in 1994, ninety-five cents of every dollar went to white-owned construction firms; "Latino contractors received about 4 cents for every dollar spent on county public works construction projects [and] African-American contractors [received] less than a penny on the dollar."⁵⁹ "Women-owned construction companies received about 6 cents of every county subcontracting dollar spent."⁶⁰ Nationally, although women own thirty-seven percent of all businesses in the United States, they receive only about two percent of all federal contracts.⁶¹

Goals and targets have been effective in increasing contracts with businesses owned by minorities and women, although in many areas the goals have not been met. For example, prior to the implementa-

54. Letter from Elizabeth G. Hill, California Legislative Analyst, and Russell S. Gould, Director of Finance, to Daniel E. Lungren, Attorney General (Sept. 12, 1995) (on file with author).

55. CAL. PUB. CONT. CODE § 10115 (West Supp. 1996).

56. CAL. PUB. CONT. CODE § 10470 (West Supp. 1996).

57. 448 U.S. 448 (1980).

58. *Id.* at 492.

59. CAL. SENATE OFFICE OF RESEARCH, *supra* note 29, at 45.

60. *Id.* at 46.

61. Gary Belsky & Susan Berger, *Women Could Be Big Loser if Affirmative Action Fails*, MONEY, Aug. 1995, at 21.

tion of goals and timetables, in fiscal year 1989-90, about 0.52% of the California Department of General Services' contracts were with minority-owned businesses. After the implementation of goals and timetables there was a dramatic change. In fiscal year 1992-93, 10.1% of contracts were given to minority businesses.⁶² This, of course, is still less than the original goal of fifteen percent and much less than the proportion of minorities in the population. Comparatively, in fiscal year 1992-93, 5.8% of the Department of General Services contracts were given to women-owned businesses.⁶³

Further examples of the effect of these goals is evidenced in contracting with the California Department of Corrections and the California Department of Water Resources. Contracts with the Department of Corrections went from 1.1% given to minority businesses in 1990 to 6.7% in 1994. Contracts with women-owned businesses went from 0.4% in 1990 to 6.2% in 1994.⁶⁴ Similar statistics exist for the California Department of Water Resources contracts where in 1990, 6% of contracts were given to minority-owned businesses and 1% were with women-owned businesses. In 1994, after the implementation of the goals and timetables, the numbers had risen to 10.9% with minority-owned businesses and 6.1% with women-owned businesses.

These statistics reveal that the goals and targets set to cure discrimination in public contracting are not quotas. Indeed, the fifteen percent target for minority-owned business has not been met in any area. However, statistics show that goals and targets have made an enormous difference. These benefits and future advances would be lost if the CCRI is adopted.

III. Allowing Discrimination Against Women

In addition to eliminating the many necessary and desirable programs described above, the CCRI would actually tolerate more discrimination against women than is permitted under current law. Subdivision (c) of the proposed initiative states: "Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of

62. DEPARTMENT OF GENERAL SERVICES, REPORT TO THE GOVERNOR AND LEGISLATURE ON MINORITY, WOMEN AND DISABLED VETERAN BUSINESS ENTERPRISE PARTICIPATION IN DEPARTMENT OF GENERAL SERVICE CONTRACTS 2 (1993).

63. *Id.* at 1.

64. CAL. RESEARCH BUREAU, CAL. STATE LIB., *Overview on Affirmative Action in Discrimination and Affirmative Action H-25* (Assembly Judiciary Comm., Cal. State Legis. 1995).

public employment, public education, or public contracting.”⁶⁵ Under current law bona fide qualifications based on gender are allowed only in the area of employment. Title VII of the 1964 Civil Rights Act permits gender discrimination in employment only if there is a bona fide occupational qualification. The Supreme Court has declared that this is an “extremely narrow” exception to the general prohibition against gender discrimination in employment.⁶⁶ However, there is no assurance that California courts will interpret the “bona fide qualification” language in the CCRI as narrowly as the current standard. It is particularly troubling that the California Attorney General’s summary of the initiative states that the provision “does not prohibit reasonably necessary . . . qualifications based on sex”⁶⁷ This is much broader than current law because it would not require proof of a bona fide qualification as the justification for gender discrimination. Indeed, the fact that the Attorney General describes the provision in terms much different than current law could be used by courts in the future to depart from the narrow and settled meaning of “bona fide occupational qualifications.”

Very significantly, subdivision (c) does not use the same language as the current exception that exists for employment discrimination. The law now allows gender discrimination in employment only where it is reasonably necessary for a “bona fide *occupational* qualification.”⁶⁸ Subdivision (c) of the CCRI leaves out the word occupational. This is significant because the United States Supreme Court has stressed the word “occupational” in explaining why this is a narrow exception to the CCRI. For example, in *International Union, UAW v. Johnson Controls, Inc.*,⁶⁹ the Court emphasized that the word “occupational” means that discrimination is allowed only in “instances in which sex or pregnancy actually interferes with the employee’s ability to perform the job.”⁷⁰ In *Johnson Controls*, the Court said that the employer could not exclude potentially fertile women from working in a battery factory because women were equally capable of performing the occupation of making batteries.⁷¹ Omitting the word “occupa-

65. CCRI, *supra* note 1.

66. *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977).

67. Daniel E. Lungren, Official Title and Summary Prepared by the Attorney General, in CALIFORNIA BALLOT PAMPHLET, GENERAL ELECTION, NOV. 5, 1996 (forthcoming Sept. 1996).

68. *Dothard*, 433 U.S. at 334.

69. 499 U.S. 187 (1991).

70. *Id.* at 204.

71. *Id.* at 206.

tional" thus broadens the scope of subdivision (c) as compared to current law.

Moreover, no current law, state or federal, allows gender to be used as a bona fide qualification for public education or public contracting. Yet, the CCRI would do this and thus expressly permit discrimination against women in areas where it never has been permitted by law. The practical effect is difficult to assess as claims of a bona fide reason for discriminating against women in contracting or education are non-existent. Subdivision (c), however, would serve to open the door to gender discrimination by expressly permitting it.

First, and most important, subdivision (c) would lessen the standard of review for claims of gender discrimination brought against the government.⁷² Currently, under the California Constitution, gender is treated as a suspect classification, meaning that a program must survive strict scrutiny if it uses gender-based criteria.⁷³ The use of strict scrutiny means there is a strong presumption against gender discrimination and it will be allowed only if the government can prove that it is necessary to achieve a compelling government interest. Subdivision (c), however, states that gender can be used as the basis for discrimination if it is "reasonably necessary" to do so in education, employment, or contracting. This language is characteristic of rational basis review and would allow significantly more discrimination against women. Rational basis review is enormously deferential to the government and rarely invalidates government actions.⁷⁴

As an amendment to the California Constitution, the CCRI would change the standard of review in gender discrimination cases and substantially lessen constitutional protection against sex-based discrimination in education, contracting, and employment. Because of

72. Gender discrimination is subject to intermediate scrutiny at the federal level and strict scrutiny under current California law. *See supra* note 17; *infra* note 73.

73. *See Sail'er Inn v. Kirby*, 5 Cal. 3d 1, 16-17, (1971) (stating that gender is a suspect classification and strict scrutiny should be used).

74. *See, e.g., McGowan v. Maryland*, 366 U.S. 420, 426 (1961) ("[A] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."); *McDonald v. Board of Election Commissioners*, 394 U.S. 802, 809 (1969) (stating that statutory classifications will be invalidated "only if based on reasons totally unrelated" to legitimate governmental ends); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981) (stating that a statute will survive so long as a legislature "could rationally have decided" that the statute would fulfill its purpose); *Heller v. Doe*, 509 U.S. 312, 321 (1993) (The Court observed that "courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends."); *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993) (stating that "a statutory classification . . . must be upheld . . . if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.").

the radical difference between strict scrutiny and rational basis review, the CCRI would eviscerate the California Constitution's current protection against gender discrimination.

Supporters of the CCRI argue that the effect of subdivision (c) is narrowed by its initial words, "Nothing in this section,"⁷⁵ and that subdivision (c) would not modify other provision in the California Constitution. This argument, however, ignores that the CCRI is an amendment to the California Constitution. Currently, the California Constitution assures equal protection in Article I, section 7, which states: "A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws."⁷⁶ Also, Article I, section 8 declares: "A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin."⁷⁷ The CCRI would amend these provisions. Thus, in the areas of public contracting, education, and employment, the CCRI would replace the existing California constitutional provisions with regard to race and gender discrimination. That, of course, is the purpose of the CCRI and, in addition, it is well established that more recent and more specific constitutional and statutory provisions control over earlier ones.⁷⁸

This is not a repeal by implication, but rather, an explicit change in the California Constitution. The California Supreme Court has explained that "[i]n order for the second law to repeal or supersede the first, the former must constitute a revision of the entire subject, so that the court may say that it was intended to be a substitute for the first."⁷⁹ The CCRI is an express amendment of the California Constitution. If it is adopted, any court dealing with an issue of discrimination or preference in the area of contracting, education, or employment will be required to apply its provisions and not the prior California Constitution which it modifies. Thus, any court dealing with any issue of gender discrimination in contracting, education, or employment under the California Constitution will be required to apply subdivision (c).

Additionally, the CCRI will open the door to further discrimination against women by educational institutions and in contracting that would not be allowed under current law. Schools could attempt to

75. CCRI, *supra* note 1.

76. CAL. CONST. art. I, § 7.

77. CAL. CONST. art. I, § 8.

78. See *Legislature of Cal. v. Eu*, 54 Cal. 3d 492, 510-11 (1991) (stating that the California Constitution may be changed by a measure that on its face alters or reforms its terms).

79. *Board of Supervisors of San Diego County v. Lonergan*, 27 Cal. 3d 855, 868 (1980).

argue that particular programs are justified in excluding women based upon some "bona fide" difference between men and women. Government agencies could make similar efforts in issuing contracts. In essence, the concern is that section (c) permits discrimination in areas where the law does not currently allow it.

For example, the CCRI could well permit increasing disparities in funding for athletic programs for men's and women's sports. Enormous gender disparities continue to exist in sports funding at the high school and college levels. Despite efforts under federal Title IX to reach equilibrium, men receive seventy percent of college athletic scholarship money, and men's sports receive eighty-three percent of college athletic recruiting money.⁸⁰ Current law, at both the state and federal levels, is committed to ending this disparity by disallowing exceptions that permit disparity even if it serves a bona fide purpose. California law is crucial, both for schools that are not covered by Title IX because they do not receive federal funds, and for all schools as an additional enforcement mechanism. Additionally, if efforts now pending in Congress are successful in weakening Title IX, there will be no mechanism to advance equality in sports funding except at the state level. If the CCRI is adopted, it is quite possible that California's efforts at equalization will be eliminated. Schools will utilize the language of the CCRI and argue that the disparities in athletic funding are a "bona fide" basis for gender discrimination under section (c) of the initiative. Thus, although it is impossible to know how courts ultimately will rule, there is an enormous risk that adoption of the CCRI would place funding for girls' and women's sports in danger.

Supporters of the CCRI argue that subdivision (c) is necessary to protect privacy, such as by preventing men working as locker room attendants in female locker rooms. However, subdivision (c) is not phrased as a limited provision dealing only with privacy, but rather, has broad language applicable to all government actions. Also, no specific exception is necessary to safeguard privacy. The current California Constitution prohibits gender discrimination but has no provision like subdivision (c) and, of course, no court has interpreted the Constitution in a manner that creates a threat to privacy. If nothing else, the express protection of privacy in the California Constitution, which is unmodified by the CCRI, would provide adequate safeguards even if subdivision (c) was not included.

80. FEMINIST MAJORITY FOUNDATION, EMPOWERING WOMEN IN SPORTS 1 (1995).

IV. Conclusion

This Article is not intended to be a comprehensive review of the impact of the CCRI. Rather, it is an initial attempt to assess the consequences if the initiative is adopted. Although the data is incomplete, especially as to city and county affirmative action efforts, the conclusion is clear: the CCRI would have a devastating effect on programs designed to remedy discrimination against women and minorities. The gains of past years would be erased, and additional progress would be unlikely. Thus, two central conclusions emerge:

1. A wide array of programs would be eliminated. These include efforts to target women and minorities for recruitment, outreach programs, and goals and timetables. The result would be a substantial increase in unemployment among Blacks, women, and other minorities. It would mean that fewer minority students would attend colleges and universities and more would drop-out once there. Fewer girls would be likely to take math and science programs, and essential programs for women on campuses would be abolished. Finally, it would mean that long-standing discrimination in government contracting against businesses owned by women and minorities would continue and probably increase.

2. Subdivision (c) of the CCRI would significantly lessen current protections against gender discrimination. Subdivision (c) would permit discrimination in education, employment, or contracting if it is reasonably necessary to a bona fide qualification. As an amendment to the California Constitution, this would change the standard of review from strict scrutiny for gender discrimination to the rational basis test. Simply put, it is the difference between the courts allowing gender discrimination only in rare and compelling circumstances and the courts allowing gender discrimination in virtually any situation. Moreover, subdivision (c) would expressly permit gender discrimination in areas where the law has never allowed it. Entirely apart from the remainder of the initiative, subdivision (c) would have a profound effect on the law in virtually eliminating protection against gender discrimination under the California Constitution.